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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-90
Regulations Governing Broadcast	)	
Television Advertising	)	

COMMENTS OF CBS INC.

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August 28, 1995

HFJ/11493

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SUMMARY

The offering of repping services to affiliated stations is a natural enterprise for any broadcast television network -- an inherent part of networking's economic potential. By prohibiting networks from fully exploiting their expertise in national advertising, the repping rule indirectly diverts potential resources from the support of universal free television, which relies on economically viable networks to achieve the efficient distribution of programming.

The markets relevant to television have changed radically since the repping rule was adopted in 1959. The Commission's decision to bar network companies from repping their affiliates rested, implicitly, on its sense of extreme supply-side concentration in two of these markets -- the national advertising market and local video programming markets. But the television advertising opportunities availabile to national advertisers have exploded since 1959, and so have the programming opportunitites available to local stations.

On the advertising side, both network and national spot inventories have expanded enormously with the sharp growth in the number of both broadcast networks and stations, and formidible competitors such as cable network and national barter syndication, as well as emerging technologies such as DBS, have joined the market. Moreover, television advertising today, as in 1959, is only one segment of a far broader and highly unconcentrated national advertising market encompassing magazines, newspapers, outdoor advertising and other media -- a market with a Herfindahl-Hirschman Index ("HHI") of only 134. Even the video-only segment of this market has an HHI of 850 -- well below the 1000 level considered by the Department of Justice to be the threshold of moderate concentration.

Local programming markets have changed, if anything, even more dramatically since 1959. Where once a broadcast television station could look look for its programming to "two - and-a-half" networks and a few cash-syndicated programs, today a station may turn to any of four established networks, two emerging ones, and a host of barter syndication alternatives to network programming.

These market changes leave the repping rule with no conceivable purpose. The breadth of competition in the national advertising market assures that even if a network's affiliates were willing to allow a network-owned rep to inflate their national spot prices, there is no way that by doing so a network company could hope to redirect advertiser demand toward its own network rather than toward any of a host of suitable alternatives Likewise, the intensely competitive supply side of local video programming markets assures that, even if network-owned reps could hope somehow to support network prices by overpricing affiliates' national spot inventories, affiliates would not permit them to try. Affiliates have no reason to allow their spot revenues to be diverted in this way and have more than adequate bargaining power to prevent it.

Repeal of the repping rule would in no way diminish diversity in any intellectual market. Although reps sometimes advise client stations in their selection of syndicated programs, the only useful measure of source diversity is copyright ownership. In any event, actual programming decisions are made by stations themselves, not their reps. Stations are quite capable of evaluating a rep's programming advice in light of any theoretical conflict that might arise from the programming activities of the rep's parent firm, and do so currently.

Far from protecting competition, the repping rule needlessly restricts competition in the repping industry itself. There is every indication that if the repping rule is repealed, the result will be to increase the competiveness and efficiency of the repping industry, to the benefit of advertisers, affiliates and the general public.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, respectfully submits these comments in response to a Notice of Proposed Rulemaking ("Notice") in which the Commission is considering, as part of its ongoing reassessment of its regulation of the relationship between broadcast television networks and their affiliates, whether to repeal two rules relating to affiliates' sale of advertising time. (Notice at ¶1). The first of these rules prohibits networks from controlling or influencing the rates at which affiliated stations sell advertising time (the "station rate rule").[1] The second rule bars network companies from representing their affiliated stations in the "national spot market" in which stations sell advertising time to national advertisers (the "repping rule").[2]

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[1] 47 C.F.R. §73.658(h).

[2] 47 C.F.R. §73.658(i)

CBS believes that these two rules present two very different questions of public policy -- one academic and the other of critical importance There is no reason for any network to wish to control its affiliates' advertising rates. Even if such control could be exercised, it would neither aid the network nor have a meaningful impact on any advertising market. Therefore, apart from our principled opposition to unnecessary rules of any kind, CBS herein expresses no opinion with regard to the station rate rule.[3]

The repping rule is quite another matter. We are convinced that repeal of the repping rule would enhance competition among repping firms, strengthen broadcast networks and improve the quality of repping services available to affiliates, all without posing any detriment of any kind to the public interest. CBS strongly urges the Commission to eliminate the repping rule.

I

INTRODUCTION

The capacity of advertising revenue alone to support expensive first-run television

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[3] Standing alone, the station rate rule cannot be interpreted as barring a network company from providing an affiliate with the kind of pricing advice and consultation routinely provided by a sales representative to its clients. The fact that the repping rule was separately adopted more than a decade after the station rate rule plainly demonstrates that the Commission never considered the station rate rule alone to constitute a bar to the provision of repping services to affiliates by a network company. See, Report on Chain Broadcasting, Commission Order No. 37, Docket 5060, at 73-75 (1941) ("Chain Broadcasting Report"), in which the station rate rule was adopted, and Report and Order in Docket No. 12746, 27 FCC 697 (1959), recon. denied, 28 FCC 447 (1960), ("Network Spot Sales Report"), in which the Commission promulgated the repping rule

programming is a function of the efficiency with which that programming can be exposed to the widest possible audiences. For that reason, national broadcast television networks are crucial to the maintenance of universal free access to first-quality television programming.[4] In their struggle to compete effectively with well-funded subscription services for expensive programming, broadcast networks are pressed more than ever to realize their full economic potential.

The offering of repping services to affiliated stations is a natural enterprise for any broadcast television network, and so represents an inherent part of that potential. The core business of a broadcast network requires it to develop a thorough knowledge of national advertising and advertisers. A network thus is rich in the very expertise that is also central to the repping business. By prohibiting networks from exploiting that expertise fully, the repping rule indirectly diverts potential resources from the support of universal free television. The rule also reduces the efficiency of the national spot advertising market by barring highly qualified potential competitors.

The public receives no benefit at all to offset these detriments. The rule does not serve to protect or enhance the competitiveness of any economic market or the diversity of any

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[4] As a special committee of Commission staff observed in its 1980 Network Inquiry Report:

> "Television networks are not profit-siphoning intruders into a system of local broadcast stations; they are indispensable organizers of the nation-wide system of television broadcasting."

Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Vol. I at 520 (1980), ("Network Inquiry Report").

intellectual market. And while inevitably there are some private players who benefit from the artificial diminution of competition in the repping business, the rule does not function to protect the affiliated stations of broadcast networks in any way.

The markets in which television networks and stations participate have changed radically since the repping rule was adopted in 1959[5] on the recommendation of the 1957 Barrow Report,[6] and these market changes have deprived the rule of any logical foundation. The Commission's decision to bar network companies from repping their affiliates rested, implicitly, on its sense of extreme supply-side concentration in two of these markets -- the national advertising market in which network and national spot time was sold, and the video programming markets in which networks "sold" their programming service to their individual affiliates. The Commission found that "network and national spot are the sole competitors for national television advertising"[7] and that this "market" was sufficiently narrow and isolated to permit a network possibly to support its own prices by inflating the price of its affiliates' national spot inventories.[8] Moreover, the Commission concluded that affiliates might have no choice but to accept these self-interested manipulations by a network rep -- that competition among purveyors of programming to local

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[5] Network Spot Sales Report, supra, 27 FCC 697 (1959).

[6] Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (October 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85 Congress, 2d Sess (1958) (the "Barrow Report").

[7] Network Spot Sales Report, supra, 27 FCC at 715.

[8] Id. at 714-19

stations was then so weak that affiliates might be forced to accept these spot revenue losses as the price for preserving their indispensable network affiliations.[9]

Whatever the validity of these market assessments in 1959, they clearly have no bearing on the competitive conditions of the markets in which broadcast networks and stations participate today. The television advertising opportunities available to national advertisers have exploded since 1959. Both network and national spot inventories have expanded enormously with the sharp growth in the number of both broadcast networks and stations. And there are now new and far closer substitutes for broadcast network advertising than national spot -- formidable competitors such as cable network and national barter syndication that, like broadcast network advertising, but unlike national spot, allow an advertiser to achieve in a single transaction product exposure which is national and often simultaneous. Waiting in the wings are television media which promise to provide for national advertisers still other viable alternatives to network television -- including, most prominently, DBS. Moreover, television advertising today, as in 1959, is only one segment of a far broader national advertising market encompassing numerous other media, such as radio, magazines, newspapers and outdoor advertising, and this non-video component of the market, too, has grown substantially since 1959.

Local programming markets have changed, if anything, even more dramatically since adoption of the repping rule. Where once a broadcast television station could look for its programming to "two -and-a-half" networks and a few cash-syndicated reruns and pre-1948 movies, today a station may turn to any of four established networks, two emerging ones, and a

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[9] Id. at 716-17; see also id. at 712-14

host of barter syndication alternatives to network programming. The day has long past when local programming markets were "sellers' markets" for networks.

These market changes leave the repping rule with no conceivable purpose. The breadth of competition in the national advertising market assures that, even if a network's affiliates were willing to allow a network-owned rep to inflate their national spot prices, doing so would be of no value in supporting network prices. Even a network that repped every one of its affiliates would be powerless to manipulate the market price for either network or national spot time, and in the end would have to sell both inventories at competitive prices or sell none at all.

Likewise, the intensity of competition on the supply side of local video programming markets assures that, even if network-owned reps could hope somehow to support network prices by overpricing affiliates' national spot inventories, affiliates would not permit them to try. Affiliates have no reason to allow their spot revenues to be diverted in this way and have more than adequate bargaining power to prevent it. Indeed, with all the programming alternatives now available to them, there is no reason to believe that affiliates would be willing to accept less favorable financial arrangements than now exist in order to maintain their network affiliations. In fact, precisely the opposite appears to be true, as evidenced by the general increase in network compensation payments to affiliates and the decline in clearances of network programs.

Intense competition either in the national advertising market or in local programming markets would by itself be sufficient to guard against the abuses the repping rule is intended to prevent. The fact that intense competition exists in both of these markets establishes twice over that the repping rule is entirely unnecessary to protect competition.

In fact, competition is needlessly restricted by the rule. In its 1980 Network Inquiry Report, the Commission's staff found that allowing network companies to compete for clients with existing repping firms would likely increase the efficiency of the repping industry itself.[10] The staff observed that while the repping rule "appears pro-competitive because it reduces the probability that [repping] arrangements may be employed indirectly to affect affiliates' prices," the rule "may lessen competition either by prohibiting lower cost suppliers of 'rep' services (i.e., networks) from competing in that market or by increasing the costs of networking."[11]

The time has long passed when broadcasting can sustain the inefficiencies of sweeping prophylactic rules once readily imposed on the industry whenever a potential marketplace dysfunction was intuited. Virtually all of these rules address interests that can be adequately protected by the antitrust laws without triggering the massive distortions caused by preemptive regulation. Indeed, in the case of the repping rule, it is difficult to imagine any circumstance resulting from the rule's repeal that could possibly require antitrust intervention.

II.

REPEAL OF THE REP RULE WOULD NOT DIMINISH COMPETITION IN THE SALE OF NETWORK OR NATIONAL SPOT TIME

The belief that the rep rule protects competition is predicated on two assumptions: (1) that it is possible, by controlling affiliates' national spot prices, for a network to control or

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[10] Network Inquiry Report, Vol. 1 at 492-496.

[11] Id. at 494.

influence the price for network time; and (2) that a network may have the power to require its affiliates to accept overpricing of their national spot inventories in order to support network prices. An examination of the advertising and programming markets in which networks and stations participate makes apparent that both of these assumptions are false.

A. The National Advertising Market Is Far Too Broad And Unconcentrated To Permit A Network To Influence Network Prices By Controlling Its Affiliates' National Spot Prices.

In the FCC's 1984 multiple ownership proceeding, the Department of Justice's Antitrust Division supported the elimination of the national limitations on station ownership for all broadcasters, including television networks. In its comments, the Department of Justice opined that national spot prices do not constrain network prices because network and national spot participate in separate national advertising markets.[12] In its recent Further Notice of Proposed Rulemaking examining its existing limits on station ownership, the Commission also expressed the tentative conclusion that network and national spot sales are not mutually competitive.[13] The Department of Justice based its analysis on the fact that national spot carries considerably higher transaction costs than a network buy and is generally unable to provide an advertiser with

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[12] Department of Justice Comments in Gen. Docket No. 83-1009 (Multiple Ownership), February 21, 1984, at 14-16 ("DOJ Comments")

[13] Further Notice of Proposed Rulemaking in MM Docket Nos. 91-221 and 87-8, FCC 94-322 (released January 17, 1995) ("Ownership Notice")

simultaneous national exposure.[14] The Commission observed that rather than competing with network advertising, national spot is used primarily to achieve regional exposure for a product.[15]

Clearly, if network and national spot advertising participate in different markets, then a network company's repping of its affiliates cannot possibly reduce competition in either market, no matter how much hypothetical influence over station pricing is imputed to the rep. If the Justice Department's comments and the tentative conclusions of the Commission's Ownership Notice are correct, then there is no economic basis at all for the repping rule.

In fact, as we have made clear in our comments in the Commission's current ownership proceeding, we believe that the product market definitions proposed by the Department of Justice and the Commission are far too narrow, and that network and national spot advertising do compete with one another as participants in a broad national advertising market.[16] That market, however, is so vast and unconcentrated that no player could possibly hope to control prices within it.

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[14] DOJ Comments at 14-16.

[15] Ownership Notice at ¶ 37.

[16] Thus, while it is certainly true that national spot is an imperfect substitute for network advertising, the customary standard for product market definition is whether a candidate for inclusion would constrain pricing of the other products in the market. It is not necessary that national spot be a close substitute for network advertising for all or even most advertisers in order for this constraint to occur; rather, the fact that many advertisers in many instances could substitute national spot for network or syndication advertising is sufficient to justify the inclusion of all these advertising categories in a single product market. See, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Economists Incorporated, submitted in MM Docket Nos. 91-221 and 87-8 (May 17, 1995) at Appendix D; CBS Comments in MM Dockets No. 91-221 and No. 87-8 (May 17, 1995) at 30-32.

Other participants in this market include television media that serve as far closer substitutes for network advertising than does national spot The fastest growing of these have been national barter syndication and cable network advertising. From 1983 to 1988, national advertising revenues for syndication and for cable more than tripled.[17] From 1988 to 1993, syndication advertising revenues increased by 74 9% and national cable advertising revenues more than doubled, while the combined advertising revenues of the broadcast networks increased by only 11.3% -- even though the revenues of a fourth network (Fox) were added during this period.[18] As the Commission staff observed in 1991,

> "At least since 1980, the network share [of advertising revenues] has dropped continuously and substantially. .. While the components of video advertising are all predicted to grow, the rates of increase are expected to vary greatly, with the cable and national syndication categories gaining in share at the expense of the others."[19]

Network advertising faces significant competition from other sources as well. The inclusion of national spot sales in the same national advertising market as network commercials implies a standard of substitutability sufficiently broad to encompass far more than just video media. Indeed, there are many non-video advertising media that would appear to be equal to or better than national spot as substitutes for network programming. An economic study commissioned by Capital Cities/ABC, Inc. ("ABC"). CBS, National Broadcasting Company, Inc. ("NBC") and Westinghouse Broadcasting Company ("Westinghouse") in connection with the

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[17] See, Notice at Appendix A.

[18] Id.

[19] Broadcast Television in a Multichannel Marketplace, Office of Plans and Policy Working Paper No. 26, DA 91-817, 6 FCC Rcd 3996, 4071 (1991) ("OPP Report").

Commission's current rulemaking proceeding on broadcast station ownership cited much persuasive evidence that non-video media such as radio (network and national spot), magazines, newspapers, outdoor advertising and direct marketing, compete with video advertising in the same national advertising market.[20] It does not seem reasonable to suppose that national advertisers would accept non-competitive video pricing before turning to these non-video alternatives. Indeed, there is strong indication that even in ordinary market conditions, network television advertisers have looked to non-video media, such as magazines, as substitutes for network time.[21]

Finally, it should be emphasized that since 1959, both network and national spot advertising have each in themselves become far more competitive. Inventories and competitors in both categories have significantly increased with the addition of one well-established and two emerging broadcast networks, and with an increase in the number of full-power commercial broadcast television stations from 510 in 1959[22] to 1165 in 1995.[23]

The picture that emerges is of a market so diverse and competitive that the very thought of controlling prices in it seems fanciful. Properly defined to encompass video and non-video alternatives, the national advertising market in which broadcast network and national spot

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[20] An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Economists Incorporated, submitted in MM Docket Nos. 91-221 and 87-8 (May 17, 1995) at Appendix D ("Multiple Ownership Joint Economic Study").

[21] See, e.g., "'Upfront' Study Finds Weakness For Networks," Wall Street Journal, April 2, 1991, p. B-1, cited in OPP Report, supra, 91 FCC Rcd at 4083, n. 171.

[22] TV and Cable Factbook No. 56, Cable and Services Volume, at C-299.

[23] "By The Numbers," Broadcasting and Cable, August 7, 1995, p. 60.

advertising compete has a Herfindahl-Hirschman Index ("HHI") of only 134, indicating an extreme lack of concentration.[24] Indeed, the national advertising market is so unconcentrated that even if it is subdivided, using inappropriately narrow product market definitions, the resulting segments are themselves highly unconcentrated. Thus, for example, an all-video national advertising market, consisting only of broadcast and cable network, national spot and national syndication has an HHI of 850[25] -- well below the 1000 level considered by the Department of Justice to be the threshold of moderate concentration. And as low as they are, current concentration levels in the national advertising market, and in its video-only segment, may be expected to fall even lower in the near future. The state of competition in this market can realistically be assessed only by taking account, as well, of the new technologies poised to emerge as major competitors -- including, most particularly, DBS which has characteristics strikingly similar to broadcast and cable network television, in that a single transaction may give an advertiser access to every geographic market in the United States.[26]

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[24] Multiple Ownership Joint Economic Study at 28. Under the Department of Justice/Federal Trade Commission Merger Guidelines, HHIs between 1000 and 1800 indicate moderate concentration and HHIs below 1000 indicate low concentration. It is important to remember that, while HHIs are a useful analytical tool, a high HHI in a particular market proves nothing in and of itself about actual or potential anticompetitive behavior. For example, if barriers to entry are low and the difficulty of collusion or unilateral exercise of market power is great, mergers may not be deemed anticompetitive even in a highly concentrated market. See, e.g., id. at 5, 17.

[25] Id. at 28.

[26] With their compact and relatively inexpensive disk antennas, Ku-band DBS services are off to a remarkable start and anticipate enormous growth in the next decade. Over 350,000 households subscribed to DBS by the end of 1994. Two DBS multichannel services, DirecTV and USSB, anticipate 2.5 million to 3 million total subscribers by the end of 1996. DirecTV projects 10 million DBS subscribers by the year 2000. Multiple Ownership Joint Economic Study at Appendix A, pp. A10-A13.

In reflecting on the price manipulation scenario contemplated by the repping rule, it is important to realize that national advertisers rarely seek to purchase exposure in particular television programs. Rather they seek to expose their products to an audience of a particular size and demographic character, and if these advertisers cannot purchase that exposure from any one source at a competitive price, they have myriad alternative media vehicles from which to seek the equivalent exposure.

As a practical matter, then, a rep owned by a network company could not begin to hope that by overpricing its client affiliates' national spot inventory it could redirect advertiser demand toward its own network. Rather, that demand would flow into the broad national advertising market where it would be met by any of a host of suitable alternatives available at competitive market prices.

Moreover, while it would be possible (though irrational) for a rep consistently to sell its client stations' time for less than its market value, there is no reason any national advertiser would be willing to purchase time for more than its market value. Advertisers have far too many national spot alternatives, to say nothing of the many national advertising vehicles with which national spot competes, to accept above-market prices for any one station or group of stations. A rep that insisted on trying to impose above-market prices on its client stations would simply sell little or no time at all -- a result that no station could possibly accept.[27]

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[27] For the same reason, an affiliate and its network-owned rep could not successfully collude to increase national advertising prices above competitive levels.

Thus, the concern that a rep owned by a network company might artificially inflate the selling prices of its affiliate clients to protect network prices has no basis in fact or logic. Like any rep, a network owned rep, lacking in the ability to inflate its clients' prices and lacking any conceivable motive to depress its clients' prices, may be relied upon to do the only thing a rep can do -- to sell its clients' time at prevailing market prices.[28]

B. Even If They Had Some Rational Motive To Do So, Networks Do Not Have The Bargaining Power To Require Their Affiliates To Overprice Their National Spot Inventories Due To The Intensely Competitive Supply Side Of Local Programming Markets.

To exert undue influence over its affiliates' spot prices, a network would need to overcome the natural desire of every station to be represented in the national spot "market" by a firm that has demonstrated its ability and willingness to maximize the station's revenues rather

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[28] Even if pricing manipulation were theoretically possible, it is difficult to see how it could be accomplished in practice. Unlike the situation which prevailed during the period on which the Commission focused in its 1959 Network Spot Sales Report, 27 FCC 697, supra, charges for network time are no longer based on the sum of the "network rates" of all of a network's affiliates individually ordered by an advertising agency to carry a sponsored program on behalf of a client or clients. See, Barrow Report, supra, at 291-96; 402. Rather, network time is now sold based on the demographic characteristics of the audience which a particular package of spots purchased by an advertiser is expected to reach. While a network typically offers an advertiser a guarantee that its announcements will be viewed by a minimum number of persons with the specified demographic characteristics, no guarantees are made that specific affiliates will broadcast the announcements. In these circumstances, because there are no market-by-market network rates which could be used as a basis for comparison, a network-owned rep could not manipulate its clients' prices to make them appear unfavorable as compared to a network purchase. And even leaving this fact aside, a network attempting such manipulation would have to control its affiliates' rates in virtually every market in the country, and make highly complex calculations to determine national spot rates which would be unattractive to advertisers, while still escaping antitrust scrutiny. The entire notion seems nothing less than fanciful.

than to divert them. Presumably, this self-interest on the part of stations should quite adequately defend the marketplace against any conceivable price manipulations by self-interested reps.

Underlying the repping rule, however, is the suspicion that networks have vast reserves of bargaining power to throw against their affiliates -- bargaining power that, for some reason, has heretofore gone unexploited but now may be used to require affiliates to accept faithless representation in the national spot market as a further price for their network affiliations.[29] The assumptions here are that current financial arrangements between networks and their affiliates do not reflect the true value to a station of network affiliation, that stations would actually be willing to accept substantially less favorable arrangements than those which now exist, and that repeal of the repping rule would provide networks with a unique opportunity to extract additional economic concessions from their affiliates by the highly indirect means of overpricing their national spot inventories.

None of these assumptions makes any sense The terms on which a network and each of its affiliates do business turn on the relative value of each to the other -- values that are determined by conditions in the particular local market in which the affiliated station is located. The crucial variables are the strength of the relationship that the station and the network have each been able to establish with that market's viewers the value to the network of exposing its programs in that particular market, and the alternatives available in that local market to both the station, as a purchaser of programming, and to the network, as a seller of a programming service. There is every reason to believe that the existing economic arrangements between networks and

[29] See, Notice at ¶¶ 16-17.

their affiliates -- which include factors such as the number of commercial availabilities provided to the affiliate in each network program, the number of hours of network programming the affiliate clears, the amount of promotional support each provides the other and, most importantly, the amount of compensation the network pays to the affiliate -- reflect quite precisely the value of the network and its affiliate to each other. There is no reason under existing rules that networks cannot seek adjustments in these variables in order to capture the full value of their affiliations. And there would be no reason, if the repping rule were repealed, for networks to attempt to do so through manipulation of their affiliates' national spot rates, rather than by the far more direct means at their disposal.

Nor is it reasonable to believe that affiliated stations would be vulnerable to such an attempted exercise of network power. The idea that stations might be forced to accept a significant reduction of their national spot revenues as an additional price of affiliation seems particularly outlandish in light of recent developments in local television program supply markets -- the markets in which networks "sell" their program services to affiliates. The successful establishment of a fourth network (Fox), the emergence of two nascent networks (WB and United Paramount), and 15 years of spectacular growth in first-run syndicated programming have made local program supply markets more competitive and less concentrated than ever before. The result has been a dramatic redistribution of television audiences in favor of independent stations (including Fox affiliates) and cable networks and away from the three traditional broadcast networks. In November, 1994, the total day share of audience captured by ABC, CBS and NBC affiliates had fallen to 47.5 percent, with the remaining 52.5 percent going to independents and Fox affiliates (17.9 percent), PBS (3.6 percent), basic cable (27.7 percent) and pay cable (3.6 percent).[30]

The resultant shift in bargaining power between networks and their affiliates is reflected in a sharp decrease in clearance of network programs and a sharp increase in the size of network compensation payments to affiliates. Thus, between 1977 and 1994, the three original networks reduced their aggregate weekly offerings to affiliated stations of non-primetime programs from 212.5 hours to 187.5 hours.[31] In September 1993, for example, CBS ceased supplying network programming to its affiliates between 10 and 11 AM due to a decline in clearances to 49% from 90% in 1986 for the 10-10:30 AM portion of that hour, and to 61% from 84% for the 10:30-11:00 segment. A similar problem of non-clearance caused the CBS Television Network to abandon the 4-4:30 PM time period in September 1986. Meanwhile, the series of affiliation realignments caused by one transaction alone, the agreement announced in May 1994 between Fox Television Stations and New World Communications Group to form new station affiliations and other joint operations, will reportedly cause the three original networks to increase their affiliate compensation payments by over $200 million.[32]

The fact is that affiliates, and especially the major market affiliates that would be indispensable to the use of national spot as a substitute for network time, have gained significant

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[30] Nielsen Television Index Special Analysis (October 31, 1994 - November 27, 1994).

[31] An Economic Analysis of the Prime Time Access Rule, Economists Incorporated, submitted in MM Docket No. 94-123 (March 7, 1995) at 91 ("PTAR Joint Economic Study").

[32] Broadcasting and Cable, "CBS's Tony Malara: In the Storm of the Eye", December 19, 1994, p. 34.

bargaining power with respect to their networks.[33] There is no reason to suppose that affiliates are prepared to pay more for their affiliations, and particularly not on the extravagant scale implicated by any serious diminution in their national spot revenues, which typically account for close to half of a station's overall revenues.[34]

In these circumstances, self-interested price manipulations, or self-interested dealing of any kind, by a network-owned rep would be out of the question. Indeed, there is no reason to suppose that an affiliate would ever cede to a network-owned rep any more power over pricing than is usually exercised by a rep -- i.e., the price at which a station sells time in the national spot market will, as usual, be controlled by the station itself.[35] A station has more than ample information with which to exercise that control. In fact, a station is far more capable than its rep of evaluating the local market conditions on which price largely depends. In addition, there are extensive research tools that a station may consult, such as BAR, Scarboro and Leigh Stowell reports, to relate these local conditions to national market trends. Many stations -- especially

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[33] See, e.g. "In Another TV Battle, Affiliates Have the Stage," The New York Times, August 3, 1995, p. D5. ("Amid the attention focused on the proposed takeovers of two television networks this week...the fight...for Outlet Communications...helps illustrate where a lot of the real power in broadcasting lies these days: with the owners of individual stations that can deliver viewers.")

[34] See, 1994 NAB/BCFM Television Financial Report at vii, 34, 146.

[35] While failing to recognize the impossibility of a rep's artificially raising the national spot prices of its clients, the Commission staff's 1980 Network Inquiry Report did implicitly recognize that establishing client prices is not an inherent part of the sales representative's role. That recognition is reflected in the fact that the Report recommended retention of the ban on a network's controlling or influencing its affiliates' spot rates while proposing reconsideration of the ban on a network's repping of its affiliates. Network Inquiry Report, Vol. 1, at 492-496.

those in major markets -- can also look to the sophisticated research capabilities of their group owners in establishing and monitoring strategies.

Every national spot sale that a rep negotiates is subject to the review and final approval of the client station,[36] and there is no reason to anticipate that this would be any different in the case of a network-owned rep. Since any particular spot may be sold either to a local or to a national advertiser, no station will approve national sales at prices lower than what the same time could be sold for locally. Conversely, as long as substantial numbers of spots remain unsold, no station would approve an asking price for its time substantially higher than the most it could hope to get from local advertisers. Any inadvertent underpricing or overpricing would soon be corrected by the station, since it would quickly show up as either an insufficient supply of, or an insufficient demand for, the station's advertising time.

Indeed, in repealing its so-called Golden West policy in 1981,[37] the Commission itself recognized that the natural incentive of all stations to maximize their national spot revenues would provide ample protection against any attempt by a rep firm to engage in self-interested manipulation of its client stations' rates. The Golden West policy, which prohibited the representation of a station by an organization owned in whole or in part by the owner of a competing station in the same market, was prompted -- much like the network repping rule -- by the concern that such representation

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[36] See, e.g., Report and Order in BC Docket No. 80-438, 87 FCC 2d 668, 674-75 (1981) ("Golden West Policy Repeal").

[37] Golden West Policy Repeal, supra, 87 FCC 2d 668.

> "might effectively reduce competition in either of two ways: by providing a convenient mechanism by which the two stations could collude or by allowing the station with the affiliated rep unduly to take advantage of any market power imbedded in the rep to place the other station at a competitive disadvantage".[38]

In eliminating the Golden West policy, the Commission found these fears to be groundless. Any impairment of competition, the Commission observed, would be "mitigated by the incentive of the unaffiliated station to seek the sales representative that will most vigorously serve its interest," noting that "[i]f that representation fails to produce the expected results, a change will be made."[39] Moreover, the Commission concluded that rep firms would be "motivated to provide maximum service to each client,"[40] and that the antitrust laws and other enforcement mechanisms would provide "ample protection" against any possible anti-competitive activities.[41]

There is even less reason for concern that repeal of the network repping rule would adversely affect competition. Unlike the situation in Golden West, which involved a theoretical diminution of competition between stations selling the same product (i.e., national spot advertising), network and national spot commercials are not perfect substitutes for each other, and any hypothetical effort by a network-owned rep to support network prices by artificially inflating its clients' rates would be extremely difficult to coordinate.[42] For this reason, among

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[38] Id. at 672.

[39] Id. at 680

[40] Id.

[41] Id. at 681.

[42] See discussion in note 28, supra.